THE EXPANSION OF CALIFORNIA'S DOMESTIC PARTNERSHIP LAW: DISCERNING THE UNCERTAIN IMPACTS OF AB 205

by Frederick Hertz

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Effective January 1, 2005, California-registered domestic partners will be subject to nearly all of the state-based rights and obligations that apply to married partners. As simple as the language of A.B. 205 reads, the long-term implications of this dramatic legislative application of marital laws to non-marital relationships (codified in Family Code §297.5 and 299) are truly complex and, to a very great degree, fairly uncertain at this time. A group of attorneys in the San Francisco Bay Area (including this author) have been meeting since last October to review and analyze the issues raised by A.B. 205, and this article incorporates the findings and preliminary insights of this group.

One preliminary note: as currently enacted, any same-sex couple and a limited set of older opposite-sex couples (who might otherwise lose Social Security benefits) may register as domestic partners – even those who reside out-of-state. However, because of the expansion of Family Code benefits and burdens to domestic partners and the possible recognition of those benefits by the Social Security Administration, there may no longer be any financial value to registration for opposite-sex couples. Thus, it is anticipated that the overwhelming majority of state-registered domestic partners will be same-sex couples.

I. Issues of Jurisdiction and Procedure

In an effort to avoid some of the obstacles that have arisen with regard to similar legislation in other states, A.B. 205 contains broad provisions regarding jurisdiction and the applicability of these laws to those that choose state registration. Non-California couples can register so long as they reside together, and non-Californians are considered to have agreed to "submit to the jurisdiction" of the California courts regarding the dissolution of their partnership, even if they live outside of California at the time of a dissolution. Similar registrations, such as Vermont's Civil Union law, are treated as equivalent to California's domestic partnership and will invoke the same broad marital rights and obligations, although local registrations that do not include equivalent property rights and obligations probably will not be recognized as equivalent.

While there will certainly be questions regarding the constitutionality of the broad jurisdiction conveyed by the domestic partnership statute, the purpose of this provision was to enable out-of-state registrants to terminate their partnership, even if they reside in a state that might not honor the registration for purposes of dissolution. What is most uncertain is whether the property and asset obligations established by A.B. 205 will ever apply to non-California couples.

The pre-A.B. 205 version of California's domestic partnership law stated that anyone who was married was precluded from registering, creating problems for those who married in San Francisco or now, in Massachusetts or Canada. A.B. 205 now clarifies that only someone who is married "to someone else" is prevented from registering, which surely was the intent of the prior legislation. Termination of a domestic partnership will generally require a judicial dissolution, just the same as is required for a marital dissolution, and the judicial council forms for dissolution will be revised accordingly. The only exception is for couples who have been together less than five years, where neither party owns any real property, where there are no children and no disputes about property or debts, and the total value of all community property assets are less than as set forth in Family Code §2400. In those very limited cases, a mere filing of a termination document with the Secretary of State is sufficient for termination -- no need even to undergo a summary judicial dissolution.

While the statute generally provides that all rights and benefits bestowed on married couples by any law of the State of California will be extended to domestic partners, there are two key arenas excluded from the statute's coverage. Rights that are created by initiative cannot, by law, be extended by legislative action, which disqualifies domestic partners from the spousal re-assessment exemption under Proposition 13 -- a serious consequence for transfers of real property upon the formation or dissolution of a partnership -- or the death of either partner. And, income is not taxed as joint income in California despite its community property character -- an attempt by the legislature to lift the burden from couples of having to file different tax returns under state rules than those required under federal law. So too, and perhaps most significantly, none of the hundreds of federal spousal benefits, especially tax exemption benefits, are extended to domestic partners.

As a result of these exclusions, the previously unified state and federal legal landscape has been radically altered. No longer are there only two categories of partners, married or unmarried, treated similarly across both state and federal lines.

The California legislature has created third species for lawyers to contend with: unmarried couples who have most, but not all, of the benefits and burdens of marriage on the state level, but who are not likely to be treated as married when they cross state lines, and most likely will not enjoy any of the federal spousal benefits, especially the tax benefits. It is this very notion of a new "third species" of family arrangements that makes the legal questions posed by A.B. 205 so very difficult to resolve.

II. Property/Asset/Debt Issues

The most powerful legal change ushered in by A.B. 205 is that it imposes community property and spousal support rights and obligations on registered partners. For gay couples who have registered since registration was first allowed in 2000 with the understanding that their registration would have little if any real impact on their financial lives, the change is especially dramatic. No longer will the financially dependent partner have to obtain a cohabitation agreement or make an attempt to prove a *Marvin* claim to obtain a share of his or her partners' assets or win post-separation support: the sharing and the support will be compulsory for registered partners in the absence of a valid pre- or post-registration agreement. The financial "tables" of non-marital partners have literally been overturned, with a presumed sharing of assets and debts instead of the previous rule of a presumed lack of any such sharing.

Apart from the secondary implications of the tax dilemmas resulting from the non-recognition of domestic partnerships by the federal authorities, California's community property and spousal support rules will be the same as apply to married couples. Earned income will be presumed community property, pre-registration assets, gifts and inheritances will be presumptively separate, most debts will be seen as joint liabilities, and valid transmutation agreements will be required in order to establish any exception to the Family Code rules regarding any particular asset. As is the case with married couples, some couples will consciously organize their financial lives in accordance with these rules, and most others will simply carry on with little awareness of the implications of these rules, until such time as a dissolution occurs. Some couples will execute pre-registration or post-registration agreements, but most will not.

As simply summarized as this extension of Family Code benefits and burdens to domestic partners may be, there are several serious uncertainties and many particular issues that make these partnerships legally different than the standard marital relationship. First, as currently written the statute is silent as to the "date of marriage" for those couples that registered prior to January 1, 2005. While the effective date of the legislation is January 2005, couples have been able to register in California since 2000, leaving unresolved the question of whether the earlier registration date should be the date of marriage in the event of a subsequent dissolution. An amendment to the existing legislation (A.B. 2580) will, if passed, establish the registration date as the date of marriage for any future proceedings.

In an attempt to deal with the unanticipated burdens created by these retroactive implications, A.B. 205 has a unique "opt-out" provision: until January 1, 2005 either partner can terminate the partnership unilaterally, simply by filling out a form with the Secretary of State. Moreover, all registered partners are receiving two letters from the Secretary of State informing them of the new law and the availability of this opt-out alternative. For this reason, the established Family Law doctrine holding that family law rules cannot be applied retroactively may not apply to this statutory situation. No doubt there will be challenges to the retroactivity aspect of A.B. 205, with or without the passage of any amendment, as the resolution of the retroactivity issue could have hefty financial consequences for couples where one partner acquired significant assets between the date of their registration and January 2005.

In addition, it is not at all certain that banks, title companies, and other commercial entities will recognize and treat domestic partners properly. While it is anticipated that partners will be able to take title as community property, it is far from certain that title companies will honor such an instruction, or know to obtain quitclaim deeds for state-registered partners when properties are transferred. The widespread assumption among financial institutions is that married people have community property and unmarried folks do not -- and it may take several years for these companies to accommodate to the "third species," the unmarried couple with community property.

Perhaps the greatest area of confusion with regard to the application of community property rules to domestic partners will be the treatment of pre-registration assets and obligations. It is certainly true that opposite-sex couples frequently have pre-marital assets and debts, which often can result in complex disputes in the event of a subsequent dissolution. However, it is believed that such situations have been more of the exception rather than the rule. Here, by contrast, nearly every long-term (and certainly most high asset) same-sex couple is likely to have had significant pre-registration assets, even where the couple registered prior to 2005. Most such couples will not have entered into written agreements regarding these pre-registration assets, and even those who have signed agreements prior to 2005 may face challenges as to the validity of those agreements -- since they most likely did not include any waivers of family law protections. In many instances separate civil lawsuits will need to be filed in a dissolution to resolve pre-registration disputes, resolved according to the doctrines of non-marital law, and thus the overlaps between pre-registration assets and agreements and post-registration asset allocations will not be easy to resolve.

Further complicating these conundrums, agreements between domestic partners will likely be evaluated as post-marital agreements -- even those that were entered into prior to January 2005, because of the retroactivity rule. The current proposed amendment creates a June 30, 2005 deadline for allowing registered partners to enter into agreements subject only to the standards for pre-nuptial agreements, but it is unclear how such a provision would be applied. In addition, for those couples that have been together for significant periods of time, the existing confidential relationship between the partners will trigger the

higher standards for evaluating such agreements, even apart from any "marital status" label.

Where pre-registration agreements are upheld, they may only apply to pre-registration assets, triggering even more complicated disputes over the application of various laws and agreements to various phases of asset and property ownership. And, the general lack of awareness in the legal community, as well as in the general public, regarding the implications of A.B. 205 will make the questions about the validity of partnership agreements only more difficult to resolve. What is clear is that any formal agreements entered into from this point forward should meet the standards of a post-nuptial agreement, and should deal comprehensively with pre-registration assets as well as post-registration assets. To the extent that the couple entered into cohabitation or co-ownership agreements earlier on, these older agreements should be expressly revoked, so that all of the couple's issues can be resolved in one up-to-date agreement.

As is true for most married couples, these issues will generally lie dormant unless and until there is a dissolution. Then, all of the problems of the pre-registration assets, the uncertainties regarding the issue of retroactivity of A.B. 205, and the challenges to the validity of any pre-registration agreements will all come to a head. And remember, in the first several years after A.B. 205 goes into effect, nearly every such issue will be one of "first impression." It is likely that there will be many test cases and many uncertain outcomes until the courts or the legislature resolve these new and unique legal questions.

Problems in implementation are likely to arise even in the non-tax realm from the broad non-recognition of the domestic partnership rules. It is uncertain, for example, how the lack of federal tax exemptions will fold back into the determination of spousal support or pension allocations. Indeed, it is not even known at this point whether or not QDROs will be available for enforcement of pension awards. For those whose partners who have federal pensions or federally-regulated assets, it is unclear whether the federal non-recognition will limit awards of community property with regard to these assets. In simpler non-contested dissolutions it will likely be possible to reach compromise resolutions between the partners without tackling these legal complexities, but for higher-asset couples and in high-conflict dissolutions, it may be impossible to avoid these complications.

Finally, it is quite possible that the existing rules regarding spousal support will be applied differently to state-registered domestic partners, for two reasons. First, prejudices regarding gender roles may creep subtly into the judicial decision-making regarding claims for support: will male "wives" receive much sympathy, and will lesbian "husbands" generally be viewed as liable for support? Second, the current rule of disregarding pre-marital cohabitation for calculating the length of a marriage does not make practical or legal sense for couples who were unable to marry (or, even register) prior to 2000. Thus, it would seem extremely unfair to one who has been financially dependent on his or her partner throughout a twenty-year relationship to be limited to only two or three years of spousal support, especially if the couple registered in the very first year of state registration.

III. Taxation Issues

If all of these uncertainties were not enough to create dread in the heart of any family law attorney, truly the most difficult questions regarding the implementation of A.B. 205 arise from the lack of federal tax recognition of domestic partners as spouses. The sweeping tax exemption of asset transfers between spouses in the formation, duration, and dissolution of their relationships has long been taken for granted by family law attorneys, allowing a carrying out of financial asset and property planning – and for the enforcement of community property and spousal support rules – without hardly any regard to possible tax consequences.

By contrast, asset transfers between unmarried partners is today an arena of great uncertainty and confusion. Presumptively such transfers are not exempt from taxation, although in particular situations persuasive arguments can be advanced for tax exemption for particular sorts of transfers. In the event of an asset transfer at the time of a dissolution, for example, exemptions have been asserted either under a trust theory or implied contractual rights theory – arguing that the receiving partner is only getting that which was equitably his or hers from the outset of the relationship, and therefore should not be taxed for such a transfer. More typically, attorneys have attempted to characterize transfers in such a manner as to invoke some other form of exemption, such as using the residential capital gains exemption in the event of a buyout of an interest in residential property, or characterizing the payments as child support where both partners are legal parents of a minor child.

The application of community property rules to domestic partners creates serious potential tax concerns, both during the duration of the relationship and, most significantly, in the event of a dissolution. Because family law in California characterizes earned income as jointly "owned" by both partners from the outset, arguably the non-earning partner is receiving some share or benefit of the earning partner's income when the income is first earned. Thus, it is theoretically possible – though unlikely in a practical sense – that the legally mandated sharing of community property income could be considered a taxable event, triggering a second tax on the income that has already been taxed when it was earned by the earning partner. For this reason, many have been counseling the need for separate property pre-nuptial agreements for high-earning couples.

It is unlikely that there will be many audits of such legally implied "transfers" during the course of a partnership, but significant transfers of wealth and/or payment of spousal support at the time of a dissolution will most definitely pose more difficult challenges. For high-earning partners who have accumulated significant wealth, transfers upon dissolution even in excess of the federal gift limit are quite possible, and hefty spousal support obligations may be imposed as well.

On the one hand, it can be argued that a legally mandated transfer under a state doctrine of community property and state-

imposed rules of spousal support should not be considered a taxable transfer – as the receiving partner is only receiving that which is already considered legally hers or his. The payments certainly are not considered to be a gift by the paying partner, nor is it "earned" income. On the other hand, the strong statements in the legislation that domestic partners are not "married" and the non-recognition of same-sex domestic partnerships (as enunciated in the federal Defense of Marriage Act) may well result in serious tax problems for either or both partners in a high-asset divorcing partnership. This issue will take years to be finally resolved, and thus many of today's partners will become the test cases for these very thorny tax issues.

And as mentioned previously, to the extent that the tax treatment of these mandated transfers are uncertain, it will be very difficult to apply existing family law rules that assume tax exemption to such transfers, such as spousal support rules. While these same issues will arise with regard to Massachusetts marriages and Vermont civil unions, California's status as a community property state with a plethora of high-asset same-sex couples will heighten the complexity and consequences of these unresolved issues -- and may lessen the educational benefits that might otherwise be bestowed on California lawyers by those handling similar disputes in other states.

To some degree there will be state and local tax problems as well. A.B. 205 expressly states that earned income will not be considered joint income for state tax purposes. This provision was included so that the partners would not have to file differently-calculated returns for state and federal authorities. However, it is unclear whether transfers upon dissolution or spousal support will be subject to state tax. A.B. 205 is written so as to substitute domestic partners wherever spouses are protected under state law, and so presumptively there should be full state tax protection. Unfortunately, in many instances the state tax code refers to federal exemptions, and thus the lack of any federal exemption could indirectly undermine the broad intent of A.B. 205.

Another problem not resolved by A.B. 205 is that of the property tax re-assessment burden faced by unmarried couples. Because the property tax limitations were created by initiative and are embedded in the California constitution, the legislature cannot expand the spousal exemptions to include domestic partners – this requires a vote of "the people," something which has not been proposed by the legislature at this time. Thus, whenever a partner buys into his or her partner's residence, or if there is a buyout upon a dissolution or a transfer of a partial interest in a property upon death of a partner, a re-assessment of the transferred partial-interest can occur. There are several limited exceptions that can be invoked to avoid such re-assessment, such as the joint tenancy exemption, as well an archane new exemption of limited applicability enacted recently by the State Board of Equalization. However, except in San Francisco (where local officials are defying state law and refusing to re-assess property transfers between domestic partners, on constitutional grounds), voluntary transfers between partners during the course of the relationship, as well as judicially mandated community property transfers of property, could result in significant property tax burdens on domestic partners.

IV. Issues Regarding Children

Previously-enacted legislation has allowed a domestic partner to obtain a step-parent adoption of his or her partner's child, avoiding the need for the more burdensome second parent adoption. Now, under the broad terms of A.B. 205, a step-parent adoption of a partner's child to establish both parents as legal parents may not be necessary.

The uncertainty with regard to parentage issues arises from the difficulty of applying the "presumed parentage" rules for married couples to same-sex partners. While A.B. 205 presumptively provides that a child born to (or adopted by) one partner during the course of the partnership should be presumed to be a legal child of his or her partner (simply by application of the extension of all marital rights to domestic partners), the gender-based standards for rebutting this presumption could create serious confusion in the applicability of these provisions. Would a lesbian partner, for example, ever be able to avoid the rebutting of the presumption of her parentage, in light of the "procreate-ability" standards invoked by these rules? And, will federal authorities and other state jurisdictions honor the presumed parentage seemingly imposed by A.B. 205?

On the other hand, if a domestic partner is indeed a presumed parent of her or his partner's child, then how can a step-parent adoption be granted, given that it is not permitted as a matter of law for one to adopt a child that is already one's own? In light of this legal conundrum, it is anticipated that a procedure soon will be developed to allow the domestic partner of a legal parent to obtain a judicial decree, a kind of affirmation of parentage, that acknowledges the presumed parentage rights but also issues a clear judicial declaration of parentage, to avoid any uncertainties in the future regarding parentage of the child. Alternatively, in some situations a step-parent adoption would be most appropriate, especially in the event that the judicial decree procedure is not developed or is seen as inadequate for a particular couple.

One additional concern regarding parentage: in light of the presumed parentage rule, it is likely that sperm banks and ovum donor providers will require the consent of a recipient's domestic partner whenever sperm or egg is obtained, in the same manner as is generally required for married couples. If a partner is going to be treated as a legal parent simply by virtue of the couple's domestic partnership registration – and thus be liable for child support -- it is only fair that this partner's consent be required before any sperm or egg donation occurs.

VII. Professional Ethics and Standards

In light of all the complex and uncertain legal consequences of A.B. 205, the professional obligations for attorneys practicing in this area will certainly increase significantly.

Some attorneys have queried whether they have a duty to inform all of their prior clients of these new legal rules. In fact, the Secretary of State is notifying all registered domestic partners, in two sets of mailings, of the basic legal changes imposed by A.B. 205. For this reason, individual notification of existing clients probably is not required. In certain particular situations, however, especially for active client matters or where there have been recent property or asset decisions or where agreements were recently drafted, providing more comprehensive information to the clients is certainly appropriate. In any event, such notification would certainly be an effective marketing opportunity for family law attorneys!

An even more pressing ethical issue arises involving the delicate matter of joint representation. Because domestic partners are now subject to family law rules, the recently-enacted standards for the validity of a pre-nuptial or post-nuptial agreement certainly will apply to domestic partner registration agreements. Thus, independent counsel is strongly advised for any such agreements – and perhaps even for the decision-making consultation regarding the termination of an existing partnership or a new registration. Couples that are considering joint adoption or face other pressures for registering will be compelled to address the financial implications of such registration, and previously-registered couples will certainly face these issues. While attorneys can serve as mediators for couples as they decide how to handle these new legal provisions, separate counsel is definitely recommended for any registration agreements, as well as for those couples with economically unequal situations who are deliberating as to whether or not to register (or remain registered) as domestic partners.

One of the most delicate ethical issues involves that of the requirement that the attorney provide competent counsel. In order to advise clients in these matters a basic knowledge of both non-marital and marital law is required, to be able to explain to clients the various consequences of registration and of non-registration for their particular situation, and the possible need for a registration agreement for those couples who do register or stay registered. In addition, an especially high quotient of "emotional intelligence" is required, in order for the attorney to address the great uncertainties and confusion that clients will definitely experience as they try to sort out their options under these rapidly changing laws. Many long-term couples will be faced with issues that they have never seriously considered; indeed, most lesbian and gay couples have not really anticipated these legal revolutions, and the prospect of an entitlement to community property and spousal support will not be easily integrated into long-term relationships that have been shaped by more traditional expectations of financial independence.

Further professional complications arise simply from the uncertainties regarding so many aspects of the implementation of A.B. 205. Clients generally expect their attorneys to provide them guidance based upon established and definite legal rules. Here, it simply is not possible to provide much certainty regarding many of the more complex aspects of A.B. 205, especially those involving retroactivity, the treatment of pre-registration assets, and the tax implications of domestic partnership asset transfers. Responding to a client's need for advice and certainty in the face of such legal uncertainty requires an especially sensitive approach to the delivery of legal services.

Providing balanced and competent counsel in an era of such rapidly evolving law, where so many key issues are likely to remain unresolved for many years, will not be an easy task for any of us. Without a doubt, these are exciting times for those of us practicing in this area, and the intellectual and personal challenges of being a family law attorney in an era of such revolutionary legal changes will only continue to increase. The key to flourishing in these times is to incorporate the challenges into one's practice and to welcome the dramatic societal changes as yet one more opportunity for expansion, both of one's mind and one's clientele.

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